

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN CINDY YOUNKIN**, on January 26, 2001 at 3:20 P.M., in Room 152 Capitol.

ROLL CALL

Members Present:

Rep. Cindy Younkin, Chairman (R)
Rep. Rick Dale, Vice Chairman (R)
Rep. Gail Gutsche, Vice Chairman (D)
Rep. Keith Bales (R)
Rep. Dee Brown (R)
Rep. Gilda Clancy (R)
Rep. Aubyn A. Curtiss (R)
Rep. Larry Cyr (D)
Rep. Ron Erickson (D)
Rep. Christopher Harris (D)
Rep. Linda Holden (R)
Rep. Joan Hurdle (D)
Rep. Rick Laible (R)
Rep. Jeff Laszloffy (R)
Rep. Douglas Mood (R)
Rep. Bob Story (R)
Rep. Brett Tramelli (D)
Rep. David Wanzenried (D)

Members Excused: Rep. Rod Bitney (R)
Rep. Bill Eggers (D)

Members Absent: None.

Staff Present: Holly Jordan, Committee Secretary
Larry Mitchell, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 46, 1/18/2001; HB 209,
1/18/2001
Executive Action: HB 46; HB 147

HEARING ON HB 209

Sponsor: REP. CHRISTOPHER HARRIS, HD 30, Bozeman

Proponents: Anne Hedges, MEIC

Janet Ellis, Montana Audubon

Jeff Barber, Clark Fork Coalition

REP. GARY FORRESTER, HD 16, Billings

Julia Page, Northern Plains Resource Council (NPRC)

Opponents: Steve Wade, BNSF

Frank Crowley, B.F.I., Montana Solid Waste Contractors
Association & City of Billings

Gail Abercrombie, Montana Petroleum Association

Russ Ridder, Montana Resources, Montana Railink

Don Allen, Western Environmental Trade Association

Opening Statement by Sponsor:

{Tape : 1; Side : A; Approx. Time Counter : 0.9}

REP. CHRISTOPHER HARRIS, HD 30, Bozeman, stated, HB 209 is a very limited effort to close a troublesome gap in the environmental law. He stated that it discusses certain types of costs. These are the types of costs that would be incurred typically by a homeowner when their well water has been contaminated. Currently under Montana law, if someone's well water were contaminated the Department could order the responsible party or polluter to provide an alternative supply. This bill would require the responsible party to reimburse any reasonable and necessary costs to the homeowner. He submitted proposed amendments to the committee **EXHIBIT (nah21a01)**. He pointed out that he did not sign the fiscal note as he thinks there was some confusion on the notice provisions. He stated that an appropriate range would be \$12,000 - \$14,000.

Proponents' Testimony:

{Tape : 1; Side : A; Approx. Time Counter : 15.7}

Anne Hedges, MEIC, stated that HB 209 is really very simple. She gave a background on CECRA and handed out a document regarding CECRA **EXHIBIT (nah21a02)**. She spoke of the necessity of this bill and asked for a do pass.

Janet Ellis, Montana Audubon, stated that HB 209 fixes an administrative problem as DEQ is often not able to act fast enough. A day makes a big difference to a family or a business

that is dealing with pollution and this is an important bill to pass.

Jeff Barber, Clark Fork Coalition, stated that this bill is important and gave an example of the Bitterroot Valley problems. He hoped for a do pass.

REP. GARY FORRESTER, HD 16, Billings, stated that you need to look at the history of this bill. Since 1991 the Lockwood residents have been waiting for a cleanup of the contaminated site at Lockwood. Nearly \$500,000 was spent to find a P.R.P. at Lockwood. He stated that the air and water at Lockwood is contaminated. There were 14 residents that were directly affected and the E.P.A. provided a new water system for those people. It was approximately \$1,200,000 to hook up that water system. To date there has been no cleanup by the P.R.P.'s and no money paid to the homeowners. This bill rectifies some of the problems for homeowners. He asked for a do pass.

Julia Page, Northern Plains Resource Council (NPRC), stated, HB 209 is a common sense, logical bill. She made reference to the victims at the Lockwood site. She stated that you should be able to breathe clean air and drink clean water. She urged a do pass of this simple and focused bill.

Opponents' Testimony:

{Tape : 1; Side : A; Approx. Time Counter : 28.9}

Steve Wade, BNSF, stated that the amendments try to address some of his concerns. He just doesn't know if this bill is necessary because there are already provisions available to address these cases. He stated that a cost recovery action could take a long time. This creates a situation where there is going to be additional litigation. The bill could create a false sense of security. He stated that if a P.R.P. is noticed they should have the opportunity to do the cleanup work. This bill essentially turns the DEQ into attorneys for property owners. Right now he stands in opposition of the bill.

Frank Crowley, B.F.I., Montana Solid Waste Contractors Association & City of Billings, stated that his testimony is on the bill without the amendments. His fear and the fear of his clients is that HB 209 will make the existing environmental law more complicated. He is particularly concerned about the impact that this may have on VCRA, the Voluntary Cleanup and Responsibility Act. Another concern he has is that this entangles the Department and private parties. If this bill were passed it would be the only statute in Montana where a state

agency has the responsibility and the duty to proceed to recover private response costs. The bill is going to confound the system that the department has operated under. This is unwise because we hope for a settlement of these cases and the litigation will draw out the process. He doesn't want to minimize the frustrations of property owners but they can go to the department to fix these problems. This bill may tend to frustrate the operation of the current statute. He suggested that there is a simpler way for this to be done and this bill is not necessary.

Gail Abercrombie, Montana Petroleum Association, stated that this is an issue of prompt response in getting water and air quality improvements in place. There are funds available for quick response on these issues. She stated that she will be looking at the amendments but stands in opposition at this time.

Russ Ridder, Montana Resources, Montana Railink, stated that he has the same concerns as the other opponents. He gave an example in Alberton, Montana, when the railroad had a spill of chlorine gas. The response to try to mitigate problems was immediate. What concerns him is that this bill may create more problems than are already out there. He stated that the mine in Butte already has a plan in the event that the mine will be closed permanently. Any of the concerns that the people in Butte have are investigated and the mine negates their responsibility. He stated, at this time he opposes the legislation but may be able to work out his concerns with the sponsor.

Don Allen, Western Environmental Trade Association, expressed the same concerns as the other opponents. Perhaps there is a better way to address this. Regarding Lockwood, he stated that their concerns were addressed in HB 94. He stands as an opponent with the current language of the bill.

Questions from Committee Members and Responses:

{Tape : 1; Side : A; Approx. Time Counter : 48.8}

REP. ERICKSON asked **Mr. Crowley** if the victims are receiving help in paying for immediate remedies of the situation. **Mr. Crowley** stated that is an accurate representation of the problem that **REP. HARRIS** has brought to the committee. He stated that he believes that is a rare circumstance and it shouldn't happen but it doesn't justify a major surgery on the statute. Followup by **REP. ERICKSON** - We have heard about several sites today where this has happened and rare or not there are victims. There needs to be a way to solve this problem. Can we really have it both ways where there is really not a problem and there's a simpler way to solve it? That's what your testimony said, were you

confused? **Mr. Crowley** stated that HB 209 is a radical solution which could do more harm than good. He stated that the DEQ does respond to the victims' concerns and he doesn't presume a default in the current statute. **REP. ERICKSON** followed up - because you have such an extensive background, would you be willing to work with **REP. HARRIS** towards a simpler solution? **Mr. Crowley** stated that he would certainly be willing to do that.

REP. STORY asked **Mr. Crowley**, if a P.R.P. was making payments to a private party would it create a presumed liability? **Mr. Crowley** stated that it is very unlikely that any P.R.P. would make such payments to a private party without reserving all defenses and including a disclaimer that the payments in no way are any admission of liability. Followup by **REP. STORY** - then by putting this in statute it should offer that option that someone sign a waiver like that. **Mr. Crowley** stated that the bill, as it is currently drafted, states a private party is going to be reimbursed by a P.R.P. Having the Department go after a party is not fair as they may not be found liable. Followup by **REP. STORY** - assuming that a P.R.P. is required to make these payments, what happens if they are found not to be liable, can they go back to the private parties and get reimbursed. **Mr. Crowley** stated that would be doubtful. He gave an example of that happening.

REP. MOOD asked **Mr. Crowley** if this bill proposes the law further road to protections due process. **Mr. Crowley** stated that he thinks it is the bill's intent not to deprive people of due process but he doesn't see any process in the bill where the P.R.P. has any way to challenge this. He spoke about how the bill would work with landfills.

REP. GUTSCHE asked **Ms. Hedges** how she sees this bill as a simple solution. *{Tape : 1; Side : B; Approx. Time Counter : 0.1}* **Ms. Hedges** stated that this bill is very focused on doing two things for the private individual. Some of the concerns were that the DEQ would have extremely large workloads, the Department did not testify therefore they are not terribly concerned about this. The amendments take care of a lot of the issues brought up by the opponents.

REP. GUTSCHE asked **Sandi Olsen, DEQ**, what the department's stance is on the partnering of a private and a state agency that this bill addresses. **Ms. Olsen** stated that the department was very concerned with the original draft but the amendments addressed their concerns. Followup by **REP. GUTSCHE** - so in administering this piece where the department would need to somehow collect money from P.R.P.'s, are you comfortable with that? **Ms. Olsen** stated that they have had a number of concerns but there will

always be issues regarding the necessity of actions. To the extent that the opportunity for litigation against DQC is there, they are concerned about workload.

Closing by Sponsor:

{Tape : 1; Side : B; Approx. Time Counter : 5.3}

REP. HARRIS addressed the issue of the due process and appeal provisions. No due process right is in any way diminished by this bill. Regarding the issue of whether or not a state agency should sue to collect some incurred expenses, that would not be the basic lawsuit. The basic lawsuit would be the cost recovery action for the entire plant. This bill is way down the list. We are asking the Department to take on this activity because it is far too expensive for homeowners to hire attorneys to deal with this situation. The P.R.P.'s are basically immune when it comes to private causes of action. He does agree that there was not an intention to undermine the voluntary cleanup program and he would be happy to strike that provision. He stated that he will work with the opponents to craft some additional provisions. He asked for a do pass as this remains a good and necessary bill.

HEARING ON HB 46

Sponsor: REP. RICK DALE, HD 39, Whitehall

Proponents: Bud Clinch, DNRC
Jack Stuts, DNRC

Opponents: None.

Opening Statement by Sponsor:

{Tape : 1; Side : B; Approx. Time Counter : 10.1}

REP. RICK DALE, HD 39, Whitehall, pointed out that HB 46 only applies to contracts relating to state water conservation projects. The intent of this bill is to update the water division's limit which will allow them to perform certain work that's required, if the amount is under \$50,000. This is a piece of needed legislation to update current law. There are emergency provisions in law. This will benefit in the maintenance or preventing of erosion in water facilities.

Proponents' Testimony:

{Tape : 1; Side : B; Approx. Time Counter : 12.3}

Bud Clinch, DNRC, stated this bill is very specific to DNRC, to water resources and most specifically to state owned water projects. DNRC manages 34 water projects that were built as far back as the 40's and 50's as economic development projects across Montana. They also manage 10 other projects that were facilitated through the Department of Fish, Wildlife and Parks. In addition to those, DNRC manages about 300 miles of canals and fishery systems. There are a great deals of activities associated with that management, from major rehabilitation to minor repairs. In 1985 a statute was enacted where a major exemption was given to DNRC for construction costs of \$25,000 or less. That was an exemption from having to go through a formal bid process. That was an appropriate number in 1985 but it is not at this time. This bill raises the threshold of that exemption to \$50,000. The major projects that DNRC does, get into the \$100,000 range. The Tongue River Project was \$55,000,000. There is an importance and need to move forth with the projects that fall into the category of \$50,000 or less and time is of the essence. The formal process that the threshold limit is being raised on created unnecessary time constraints for these minor construction projects. The Department of Transportation and The Department of Administration have similar exemptions. As presented, the bill proposed that the limit be raised to \$75,000 however, in discussions with the Montana Contractors' Association DNRC is willing to accept an amendment to change that to \$50,000 **EXHIBIT (nah21a03)**. This bill also attempts to change a limit that is in general statutes relative to having to competitively bid goods and services in excess of \$5,000. The bill proposes a higher threshold of \$15,000 for goods and professional services specific to water projects. This would cover the costs for the use of non-construction services. The bill would exempt DNRC from going through a formal bidding process if the goods and services are less than \$15,000. **Mr. Clinch** requested a do pass of this bill.

Questions from Committee Members and Responses:

{Tape : 1; Side : B; Approx. Time Counter : 17.9}

REP. BROWN asked **Mr. Clinch** what guarantee do we have, as Montanans, that this money is going to be equitably distributed over the population who want to work on these projects. **Mr. Clinch** stated, in the negotiations with the contractors' association it was agreed that the number for the construction threshold would be \$50,000, not \$75,000. The other number would be \$15,000. If you piled these things on top of each other there would possibly be \$50,000 plus \$15,000 or \$65,000 worth of construction work and services. That is a possibility but the justification is that in terms of the type of projects that we

are doing, that's a very small dollar amount. The savings that we might generate by competitively bidding this are less than the added expense by requiring the formal bidding process. Many of these projects are managed jointly with the water users association. He also pointed out that there are no opponents of the bill. **REP. BROWN** followed up stating that three \$80,000 projects in a year is \$240,000 and that is not a small amount of money. How are these contractors chosen? **Mr. Clinch** stated that it would vary from situation to situation. The possibility of three projects within a year is very slim as only 2 - 3 projects have occurred, within these dollar limits, in last biennium.

REP. WANZENRIED asked **Mr. Clinch** what number works for the Department, \$50,000 or \$75,000. **Mr. Clinch** stated that originally they were shooting for the \$75,000 but have agreed to the \$50,000 because that is the current number at the Department of Transportation. Followup by **REP. WANZENRIED** - so you would see an amendment to go to \$50,000 as a friendly amendment. **Mr. Clinch** stated yes. Followup by **REP. WANZENRIED** - how long does the bid process take? **Mr. Clinch** stated that it takes 60 - 90 days. Followup by **REP. WANZENRIED** - how often do you use the emergency procedures. **Mr. Clinch** stated seldom. Followup by **REP. WANZENRIED** - is non-construction defined anywhere in statute? **Mr. Clinch** stated he does not believe so but it may be in the statute at the Department of Administration.

REP. STORY asked **Mr. Clinch** is it possible that a good size project could be put together by stacking a bunch of \$15,000 sub-projects together on top of the \$50,000 cap? **Mr. Clinch** stated in theory that could occur but that is not the department's intent. More likely than not the need for non-construction would probably be for maintenance of standing projects. Followup by **REP. STORY** - so on page 2, line 2, are proposed construction costs really more total project costs? **Mr. Clinch** stated yes.

REP. LAIBLE asked **Mr. Clinch** with the \$25,000 threshold now, you could stack the projects also if that was your intent? Also, will the department still be required to have three informal bids where the lowest bidder will get the project? **Mr. Clinch** stated that in theory they could have stacked the \$25,000 threshold but they would have to be pretty innovative. They are watched very closely by competitors in the market place in terms of how they conduct business. Regarding the three informal bids, the amendment strikes the language in reference to that. That was under direction of the Montana Contractors' Association.

REP. YOUNKIN asked **Mr. Clinch** regarding page 2, lines 11 - 14, it references the Department of Administration, was your reference

of \$5,000 correct? **Mr. Clinch** stated currently that references \$5,000 for non-construction services and \$10,000 for professional services. That is referenced in statute in Title 18. Followup by **REP. YOUNKIN** - would an example of a project to which this applies be Martensdale Reservoir or Bear Reservoir? **Mr. Clinch** stated those are all state owned projects. **REP. YOUNKIN** then asked, on Dead Man's Basin, for example, is the supply canal that goes from the Mussel Shell River to Dead Man's Basin also part of that project? If, for example, there was a year like 1997 with an abundance of water which caused \$45,000 worth of damages to the head gate of and intake canal and the repairs had to be done with the \$25,000 limit, would it take 60-90 days to get the contracts in place? **Mr. Clinch** stated yes, that is absolutely correct. **REP. YOUNKIN** then asked if she is correct that in 60 - 90 days the irrigation season is going to be history? **Mr. Clinch** stated that is correct. **REP. YOUNKIN** then asked if the time period for collection of high water runoff will escape for that year as well? **Mr. Clinch** stated that is a possibility. Once the repairs exceed the \$50,000, unless there was an exigency, the Department would be forced to go through the formal bidding process.

Closing by Sponsor:

{Tape : 1; Side : B; Approx. Time Counter : 36.9}

REP. DALE assured the committee that there are adequate checks. The contractors are a very watchful group and they will keep the department under their corrective eye at all times. This division of the department is staffed with a relatively high number of registered, professional engineers that are trained in these types of water projects. They have won awards for completion of projects ahead of schedule and for less money than what the budget allowed. Based on those things he has every confident that any tool that is put in their hands will be used well and efficiently. He urged a do pass on the bill, as amended.

EXECUTIVE ACTION ON HB 147

{Tape : 1; Side : B; Approx. Time Counter : 39.1}

Motion: **REP. DALE** moved that **HB 147 DO PASS.**

Motion: **REP. DALE** moved that the **AMENDMENTS FOR HB 147 BE ADOPTED.**

Discussion: **REP. DALE** explained that the amendments came about because the coal industry thought they could be lost in one of

those permitting loops that has happened historically. The department sought another way to state the same thing and these amendments do that.

REP. ERICKSON stated that he asked for a flow chart on this and they were handed out **EXHIBIT (nah21a04)**.

REP. STORY explained the flow chart.

REP. LASZLOFFY asked **Mr. Welch** if, in each of the triangles, the statutory maximum is the time that something is found unacceptable and resubmitted? **Mr. Welch** stated yes, each of those triangles is a separate review process where you are looking for a result. Once the result is satisfactory you move onto the next process.

REP. BALES asked **Mr. Welch, DEQ**, if the second triangle only applies if there is a determined need for an EIS. **Mr. Welch** stated no, the second triangle is part of the normal review process. If an EIS is required, the applicant is notified at the end of the first 90 days.

REP. BROWN asked **Mr. Welch** if this went from application and you worked through the maximum statutory limits would it be 255 days? **REP. BROWN** then asked, regarding the final EIS being published within 365 days, are we talking about 8.5 months or 20.5 months? **Mr. Welch** stated that the 365 days is how the law is currently written. This bill does get away from that so the department is not tied to a date to have the EIS done before they have the proper information to make the determination. Followup by **REP. BROWN** - does HB 147 shorten or lengthen the process? **Mr. Welch** stated it could do both. It depends on the complexity and quality of the application.

REP. ERICKSON asked **Mr. Welch** if there will still be preliminary EIS statements. **Mr. Welch** stated yes, that would go out for 30 days of public comment prior to the final EIS. **REP. ERICKSON** then clarified there would still be time, in the 120 days, for the public comment. **Mr. Welch** stated that is correct. **REP. ERICKSON** followed up asking if the current law is 30 days from the preliminary to the final EIS. **Mr. Welch** stated the current law could require that the department publish the final EIS prior to acceptability. Followup by **REP. ERICKSON** - is the 30 days enough time? **Mr. Welch** stated that the 30 days is in the MEPA law and that is adequate time.

REP. GUTSCHE asked **Mr. Welch** does this bill extend the time for completion of an EIS to forever? **Mr. Welch** stated no, we are

tied to the date of acceptability and that is a statutory time frame. Followup by **REP. GUTSCHE** so this extends the administrative work to very long or with no ending. **Mr. Welch** stated, in theory that is correct, yet, any applicant could challenge us in not acting judicially in the review process.

REP. STORY asked **Mr. Welch** where the 365 days begins, is it where complete is? **Mr. Welch** stated, that is correct. **REP. STORY** then asked for further explanation of the chart and time limits. **Mr. Welch** went over them again.

REP. ERICKSON asked **Mr. Welch** if we are, in general, going to get a faster process for most of the EA's and most of the simple EIS'? **Mr. Welch** stated he does not know if they are going to be faster. The reason for this bill was because 365 days doesn't allow completion of an EIS that is realistic. We are trying to allow for a more complete EIS statement. Followup by **REP. ERICKSON** - will a project in which only an environmental assessment has to be done, be faster or slower? **Mr. Welch** stated that he does not think that would change.

Vote: Motion that the **AMENDMENTS FOR HB 147 BE ADOPTED** carried unanimously.

Motion: **REP. DALE** moved that **HB 147 DO PASS AS AMENDED**.

Discussion: **REP. YOUNKIN** went over the testimony from Jan Sensibaugh, DEQ, who said, "The State is required to complete and publish a final EIS within 365 days from the date the DEQ determines that the EIS is necessary." She went over the problems with this.

Vote: Motion that **HB 147 DO PASS AS AMENDED** carried 17-3 with Gutsche, Hurdle, and Wanzenried voting no.

EXECUTIVE ACTION ON HB 46

{Tape : 1; Side : B; Approx. Time Counter : 60.4}

Motion: **REP. DALE** moved that **HB 46 DO PASS**.

Motion/Vote: **REP. DALE** moved that the **AMENDMENTS FOR HB 147 BE ADOPTED**. Motion carried unanimously.

Motion: **REP. DALE** moved that **HB 46 DO PASS AS AMENDED**.

Discussion: **REP. BROWN** stated that there needs to be an amendment on this bill that would not allow for that principle of stacking.

She stated that it may never be necessary but it something that needs to be guarded against. **{Tape : 2; Side : A; Approx. Time Counter : 0.1}**

REP. YOUNKIN stated that the stacking could have been done with the current statute.

REP. BROWN stated that the Department could get one company to do multiple projects to add this bill up to \$80,000. She stated that she wants some assurance that is not going to happen somewhere down the road. She stated that she considers the amendment pretty friendly.

REP. DALE stated that he opposes the amendment as it seems like a backhanded indictment of the way the Department does business. He stated that he has been around construction a lot and no one is monitored more closely by the private sector than state governments. He stated that he just doesn't think it is needed.

REP. STORY stated, during the hearing, **Mr. Clinch** stated that total construction costs are total project costs. The total costs are capped at \$50,000, the department couldn't stack \$15,000 upon \$15,000 to the cost. They would all be one project with a total cost of \$50,000.

REP. BROWN then asked **Mr. Clinch** if that is the case. **Mr. Clinch** stated that is his interpretation. Until this conversation though, the department never really thought of it. The \$50,000 and \$15,000 are for two very separate things and would very rarely be used in the same project. He couldn't honestly say that wouldn't happen.

REP. YOUNKIN stated that this code section has not been revised since 1985 and \$25,000 or \$5,000 aren't what they used to be. She gave examples of washed out ditches costing \$100,000.

REP. WANZENRIED stated that if **REP. BROWN** has any concerns about this, rather than forcing it through, we better make sure that we get the right answer.

REP. BALES stated that he is not in favor of an amendment because he thinks the Department needs latitude to do what the bill says. He stated that he doesn't think the \$50,000 or \$15,000 is a bit too much.

REP. LAIBLE stated that he is not in favor of an amendment as there has been no concern of "stacking" since 1985. This bill is a good bill as it allows the Department to go out and do some

repairs on a fast track basis. This could save the state \$100,000 down the road because the project was done quickly.

REP. HARRIS asked, if the committee is going to postpone in order to consider "anti-stacking" amendments, is that within the scope of the title of the bill? **Mr. Mitchell** stated that it does stretch it a bit and was hesitant to say it is within the title.

REP. HARRIS then suggested that the committee proceed and vote on the bill.

Vote: Motion that **HB 46 DO PASS AS AMENDED carried 19-1 with Brown voting no.**

ADJOURNMENT

Adjournment: 5:30 P.M.

REP. CINDY YOUNKIN, Chairman

HOLLY JORDAN, Secretary

CY/HJ

EXHIBIT (nah21aad)